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this Memorandum Decision shall not be  
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any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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KASHMIR LAJUAN BRAY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0605-CR-204

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Jr., Judge  
Cause No. 45G04-0509-FA-48

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**February 2, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellant-Defendant Kashmir Lajuan Bray (“Bray”) appeals the denial of his oral motion to withdraw his plea of guilty to Vicarious Sexual Gratification, a Class C felony,<sup>1</sup> Child Exploitation, a Class C felony,<sup>2</sup> and Child Molesting, a Class B felony.<sup>3</sup> We affirm.

## **Issue**

Bray presents the sole issue of whether the trial court abused its discretion by denying his motion to withdraw his guilty plea.

## **Facts and Procedural History**

The State and Bray stipulated to the following facts. During the summer of 2005, Bray met thirteen-year-old T.C. Bray expressed an interest in becoming a photographer and offered T.C. money to pose for him. On at least three separate occasions, Bray photographed T.C. in various stages of undress, including poses with T.C.’s genitals exposed. On one occasion, Bray photographed T.C. engaging in sexual conduct. On another occasion, Bray instructed T.C. to undress and fondle himself while Bray watched. Finally, Bray had anal intercourse with T.C.

On September 15, 2005, the State charged Bray with Child Molesting, a Class A felony,<sup>4</sup> Vicarious Sexual Gratification and Child Exploitation. On October 11, 2005, the State alleged Bray to be a repeat sexual offender.<sup>5</sup> On January 30, 2006, the State filed an amended Information against Bray, adding a charge of Child Molesting, a Class B felony.

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<sup>1</sup> Ind. Code § 35-42-4-5.

<sup>2</sup> Ind. Code § 35-42-4-4.

<sup>3</sup> Ind. Code § 35-42-4-3.

<sup>4</sup> Ind. Code § 35-42-4-3.

The State and Bray agreed to the terms of a plea agreement, whereby the State would dismiss the Class A felony charge and the repeat sexual offender allegation and Bray would plead guilty to the remaining charges. Bray was to receive an aggregate sentence of thirty years imprisonment (consisting of five years for each of the two Class C felonies and twenty years for the Class B felony, to be served consecutively). On January 30, 2006, Bray appeared in open court and tendered his guilty plea, which the trial court took under advisement.

On February 28, 2006, the parties appeared for sentencing. Bray orally moved to withdraw his guilty plea, apparently alleging that his attorney coerced him into the agreement with the State, and the trial court set the matter for a hearing on April 4, 2006.<sup>6</sup>

On April 4, 2006, the parties appeared and the trial court was advised of events that had transpired since the February hearing. Bray's cousin T.M. had appeared at the Gary Police Station on March 7, 2006 and reported being molested by Bray. On March 15, 2006, the State had charged Bray in connection with his conduct against T.M. Bray argued that the State had breached an implicit agreement not to file additional charges, and the State responded that the plea negotiations culminating in a plea agreement had only related to T.C.

The trial court denied Bray's motion to withdraw his guilty plea, and sentenced him to an aggregate term of thirty years imprisonment in accordance with the Plea Agreement. Bray

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<sup>5</sup> Ind. Code § 35-50-2-14.

<sup>6</sup> Although the transcript on appeal does not include the February 28, 2006 hearing, the parties agree that Bray orally moved to withdraw his guilty plea. At the April 4, 2006 hearing, the trial court referenced the prior guilty plea hearing and stated to Bray "and then you made allegations that Mr. Page forced you to do it," and Bray responded affirmatively. (Tr. 97.) Bray's counsel indicated that Bray's pro-se motion was for "reasons [of] his own." (Tr. 60.)

appeals.

### **Discussion and Decision**

Bray contends that the withdrawal of his guilty plea is necessary to correct a manifest injustice because he entered into the Plea Agreement believing that it “would resolve all of his matters and bring closure.” Appellant’s Br. at 8. He asserts that the filing of new charges “completely changed his circumstances” and thus he should have been permitted to withdraw his plea. See id.

Indiana Code Section 35-35-1-4(b) sets forth the applicable standard when a defendant pleads guilty pursuant to an agreement with the State and then requests to withdraw the plea:

After entry of a plea of guilty ..., but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea ... for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea ... whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

Our appellate courts have interpreted this statute to require a trial court to grant such a request only when the defendant proves that withdrawal of the plea “is necessary to correct a manifest injustice.” Turner v. State, 843 N.E.2d 937, 940 (Ind. Ct. App. 2006) (quoting Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998), reh’g denied). The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the

State. Id.

“Manifest injustice” and “substantial prejudice” are necessarily imprecise standards, and an appellant seeking to overturn a trial court’s decision has faced a high hurdle under the current statute and its predecessors. Id. On appeal, the trial court’s ruling on a motion to withdraw a guilty plea is presumed to be correct. Id. at 941. Therefore, one who appeals an adverse decision on a motion to withdraw must prove the trial court abused its discretion by a preponderance of the evidence. Id. We will not disturb the court’s ruling where it was based on conflicting evidence. Id.

When, as here, the defendant fails to submit a written and verified motion to withdraw a guilty plea, the issue of wrongful denial is generally waived. See Carter v. State, 739 N.E.2d 126, 128 n.3 (Ind. 2000). Waiver notwithstanding, Bray has not demonstrated that the trial court abused its discretion by refusing to grant a withdrawal to correct a manifest injustice.

Pursuant to Indiana Code Section 35-35-1-4(b), a movant must state facts in support of the relief demanded. Bray initially made an oral claim that his attorney coerced him into accepting the plea agreement. Subsequently, he argued that withdrawal was required because the State had filed new charges with respect to a new victim. Bray was apparently frustrated in his hope or expectation for “closure” of his legal difficulties.

Nevertheless, the terms of the Plea Agreement (and the text of the Stipulated Facts) clearly pertain only to Bray’s conduct with T.C. There are no specific assurances that criminal charges will not be brought if additional victims surfaced. Indeed, Bray’s attorney

acknowledged that the Lake County Prosecutor's office had, since 1979, maintained a policy against negotiating agreements including amnesty clauses. The State contended that the prosecutor negotiating the Plea Agreement with Bray gave no implicit assurances of amnesty. Even if Bray's "understanding" constitutes conflicting evidence as to the implications of the Plea Agreement, we do not disturb a ruling based on conflicting evidence. See Turner, 843 N.E.2d at 941.

The trial court acted within its discretion by denying Bray's motion to withdraw his guilty plea.

Affirmed.

VAIDIK, J., and BARNES, J., concur.